

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 140

FEDERAL BROADCASTING SYSTEM, INC., PETITIONER

v.

AMERICAN BROADCASTING CO., INC., AND MUTUAL
BROADCASTING SYSTEM

MEMORANDUM FOR THE UNITED STATES AS AMICUS
CURIAE IN SUPPORT OF THE PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

Petitioner, licensee of radio broadcast station WSAY in Rochester, New York, brought suit under Section 7 of the Sherman Act and Section 16 of the Clayton Act against the four national radio broadcast networks to recover threefold damages for injury sustained by reason of alleged violations of Sections 1 and 2 of the Sherman Act, and to enjoin their continuance. The district court refused petitioner's motion for a preliminary injunction to maintain the *status quo pendente lite* by restraining respondents' American Broadcasting Company, Inc., and Mutual Broadcasting Sys-

tem from withdrawing from petitioner's station WSAY the programs of those two networks then being broadcast by it. The Court of Appeals affirmed the district court's ruling in an opinion of broad scope, assigning grounds for the decision which may have an important bearing on the application of the antitrust laws to the radio broadcast field.¹

The Government is of the view that the opinion of the lower court, if uncorrected, may prove to be both an important obstacle to future public enforcement of the antitrust laws and a serious deterrent to the institution of private suits which might otherwise serve as an important supplementary aid in preventing monopolizations and trade restraints. The Government therefore believes that it is in the public interest that the petition for a writ of certiorari be granted.

In our view, the principal and important error of the opinion below stems from the court's misconception of the Federal Communications Commission's regulations, adopted pursuant to its Report on Chain Broadcasting (Comm. Order No. 37, Docket No. 5061, issued May 1941), the validity of which was sustained by this Court in *National Broadcasting Co. v. United States*, 319 U. S. 190. Petitioner had challenged the terms of the affilia-

¹ Since the expressions as to the substantive law contained in the opinion below will be controlling in the trial of this case on the merits, the case is not governed by the principle against reviewing interlocutory orders.

tion contracts between networks and individual stations as unlawful of themselves and in their cumulative effect. The court below rejected this challenge, and declared that "the Federal Communications Commission, after * * * consideration * * * of the Sherman Anti-Trust Act, has specifically sanctioned many of the important terms of the affiliation contracts * * *".

This determination, one of serious import, is unfounded. The Commission manifestly lacks power to "sanction" practices violative of the Sherman Act, and thus partially to repeal that Act by modifying its application to the radio broadcast field. In the Communications Act of 1934, creating the Commission and defining its powers, Congress convincingly expressed an intention, not to impair, but to strengthen the application of the antitrust laws to the radio broadcast field by imposing additional penalties for their violation. (See Sections 311, 313 of the Communications Act of 1934, 48 Stat. 1086, 1087, 47 U. S. C. 311, 313). The Commission has no statutory authority to regulate the networks as such, except to the extent that they may also be licensees of broadcast stations. The regulations which the Commission issued operate only upon individual broadcast stations by providing that the Commission will not grant licenses to those who enter into contractual arrangements containing specified restrictive terms effectively hampering their ability to operate in the public interest. The regulations thus sanctioned nothing.

They were merely an indication of the manner in which the Commission would thereafter exercise its power to grant or deny applications for licenses to operate individual stations.

Moreover, it is plain that the Federal Communications Commission not only lacked the power to condone the practices of the national networks, but did not intend, by the formulation of its regulations applicable to chain broadcasting, to "sanction" practices otherwise violative of the antitrust laws. This Court quoted with approval the Commission's view in its Report that "the prohibitions of the Sherman Act apply to broadcasting" and that the Commission was "not charged with the duty of enforcing that law". *National Broadcasting Co. v. United States*, *supra*, at 223. The Commission shares the Government's concern at the implications of the present decision. In a letter to the Department of Justice suggesting the advisability of the Government's supporting the petition for certiorari, it stated that "the language of the Court of Appeals * * * appears to reflect a serious misapprehension as to the intent and scope of the Commission Chain Broadcasting Regulations."

Petitioner objected below to the provisions commonly found in affiliation contracts which permit the national networks from time to time to fix the rates at which their respective affiliated stations will be offered by them to advertisers. The court below disposed of petitioner's objection on the

theory that it "had no inherent right to set its own rate to an advertiser and in all other respects to use the facilities of the radio network * * *". The court here took far too narrow a view of the issues before it. The Sherman Act was designed to assure that the market in any given field would not be preempted by monopolistic and trade-restraining conduct such as that here charged to respondents. *International Salt Company v. United States*, 332 U. S. 392. And the conduct of each network may be in restraint of trade irrespective of a showing of joint action. Whether or not the pattern of conduct pursued by the four national networks has effected a monopolization of the market and unlawfully circumscribed the ability of independent stations to compete, raises serious issues. It certainly is not true that the national networks have an inherent right to fix the rates at which independent stations may offer their facilities to the advertisers.

Two factors distinctive to the radio broadcast field render it particularly important that the antitrust laws be unimpaired in their application to the field. In the first place, radio broadcasting is a method of mass communication of immense importance to a democratic society, where monopolizations or trade restraints would be peculiarly menacing. See Frankfurter J., concurring in *Associated Press v. United States*, 326 U. S. 1, 27-28. In the second place, the fact that there are physical limitations on the number of stations makes it par-

ticularly desirable that no artificial restrictions upon competition be added to those imposed by nature. *National Broadcasting Co. v. United States, supra* at 218.

The Government respectfully submits that under the circumstances of the present case the petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER 1948.

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